INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provision sustaining jurisdiction	1
Statute of the State the validity of which is involved	2
Date of judgment and date of application for appeal	2
Nature of the case and rulings of the Court bringing the case within the jurisdictional provision relied on	3
Grounds upon which it is contended that the questions involved are substantial	6
Stage of proceedings and manner in which federal questions were raised	7
Manner in which questions involved were passed upon by Court	7
Cases believed to sustain jurisdiction	8
Appendix "A"—Reasons for judgment of Civil District Court in and for the Parish of Orleans, State of Louisiana	9
Appendix "B"—Opinion of the Supreme Court of Louisiana	10

Table of Cases Cited

Aero Mayflower Transit Co. v. *Board of Railroad Commissioners*, 332 U. S. 495	8
Clyde Mallory Lines v. *State of Alabama*, 296 U. S. 261	8
Fort Smith Lumber Co. v. *State of Arkansas*, 251 U. S. 532	6
Hall v. *DeCuir*, 95 U. S. 485	6
Harmon v. *Chicago*, 147 U. S. 396	6
International Harvester Co. v. *Evatt*, 329 U. S. 416	8
Moran v. *New Orleans*, 112 U. S. 69	6
Sinnot v. *Davenport*, 22 How. 227	6
Standard Dredging Co. v. *Murphy*, 319 U. S. 306	8

Page

Treichler v. *State*, 70 S. Ct. 1 8
Western Live Stock Co. v. *Bureau of Revenue*, 303 U. S. 250 6
Wheeler Steel Corp. v. *Glander*, 337 U. S. 562 8

STATUTES CITED

Constitution of the United States:

Article I, Section 8 5
Article III, Section 2 5
Fourteenth Amendment 5

Louisiana Act 25 of the Second Extra Session of 1935, as amended by Louisiana Act 5 of the Fourth Extra Session of 1935 ..... 2, 5
United States Code, Title 28, Section 1257 ..... 1, 6, 8

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SUPREME COURT OF LOUISIANA

No. 38,784

STATE OF LOUISIANA EX REL RUFUS W. FONTENOT, DIRECTOR OF REVENUE

versus

STANDARD DREDGING CORPORATION

STATEMENT AS TO JURISDICTION

Appellant, Standard Dredging Corporation, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A

Statutory Provision Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is section 1257 of title 28 of the United States Code, reading, to the extent here relevant:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity."

B

Statute of the State the Validity of Which Is Involved

The statute of the State of Louisiana, the validity of which has been sustained by the Supreme Court of Louisiana, the highest court of that State, as not being repugnant to the Constitution of the United States, is Louisiana Act 25 of the Second Extra Session of 1935 as amended by Louisiana Act 5 of the Fourth Extra Session of 1935, the pertinent provisions of section 3 of which are:

> "In addition to all other taxes of every kind imposed by law, every person . . . engaged in the state of Louisiana in any business or occupation, which person . . . uses in the conduct of such business or occupation, at any time, electrical or mechanical power of more than ten horse-power . . . shall be subject to the payment of an excise, license or privilege tax of fifty (50¢) cents per annum for each horse-power of capacity of the machinery or apparatus, known as the 'prime mover' or 'prime movers', operated by such person . . . for the purpose of producing power for use in the conduct of such business or occupation . . ."

C

Date of Judgment and Date of Application for Appeal

The date of the judgment of the Supreme Court of Louisiana sought to be reviewed herein was December 9, 1949. Application for rehearing was timely filed. Rehearing was denied without opinion on January 9, 1950, and the judgment accordingly became final on that date. The date on which the application for appeal is presented is January 9, 1950.

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D

Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provision Relied On

This is a test case out of a group of similar suits, involving substantially the same issues.

Appellant, Standard Dredging Corporation, is a New York corporation qualified to do, and having a place of, business in Louisiana. It is engaged exclusively in the business of contractor.

In the prosecution of its business as contractor, appellant has been engaged in deepening, widening, improving, extending and clearing navigable waterways.

This work is carried out with dredges enrolled as vessels of the United States, licensed by the Bureau of Marine Inspection and Navigation of the Department of Commerce of the United States to engage in the coasting trade.

Some of these vessels have been in service, from time to time, on the navigable waters of the United States within the State of Louisiana; and, during the same years for which Louisiana taxes here in question were imposed, operated also in other states and countries.

Some of the dredges are self-propelled, and navigate exclusively under their own power. Others are towed from one scene of operations to another. Many such voyages extend from one state or country to others, and frequently over the high seas.

All of the dredges are self-propelled while engaged in actual dredging operations. They can operate only while being navigated, in motion and afloat.

The generation of the power produced by the engines of appellant's dredges is essential to, and an integral part of, the employment of the vessels under their federal licenses

to engage in the coasting trade, and of appellant's business as contractor.

The license and privilege tax here in question was imposed by the State of Louisiana on the power generated by the engines of those of appellant's vessels which were within the state at any time during the tax year.

For the same years for which the foregoing license tax was levied on appellant, appellant paid the State of Louisiana a license tax as contractor under the Louisiana Occupational License Tax statute.

The State filed suit against appellant for the amount of the license tax in question plus penalties for non-payment. By appropriate responsive pleadings in the court of instance, appellant challenged the validity, *quoad* the federal constitution, of the State licensing (power tax) statute, as sought to be applied to its vessels, on the grounds that

> a. Imposition of a state license tax on power generated by the machinery of a vessel in the exercise of her federal license to engage in the coasting trade, is an invasion of the admiralty jurisdiction of the United States.
>
> b. Imposition of a state license tax on power generated by the machinery of a vessel plying the navigable waters of the United States in various states in the exercise of her federal license to engage in the coasting trade, constitutes an undue burden on interstate commerce.
>
> c. Imposition, in addition to the license tax already paid to the State by appellant as a contractor, of a tax on an integral part of that business necessary to its accomplishment, is a denial of due process under the Fourteenth Amendment.

The court of instance found that "the generation of this power is necessary for, and is an inherent and component part of, the exercise of the federal license"; and that "dur-

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ing the years for which the power taxes are sought to be imposed, defendant's vessels at times moved over the high seas, and operated on the navigable waters of foreign countries, and of the United States in various states, including at times Louisiana".

Under these circumstances the lower court held "that the power produced by defendant cannot validly be subjected to the tax imposed by Louisiana Act 25 of the Second Extra Session of 1935, as amended".[1]

The State appealed to the Supreme Court of Louisiana which reversed. It held that while the power for dredging and that "used in the navigation of the vessels" was concededly "produced by the same machinery", nevertheless "the imposition of the power tax in no way affects the permission granted under the Federal license to navigate waters of the United States for the purpose of carrying on the coasting trade, and imposes no additional condition to the privilege of carrying on such trade; nor does it result in the regulation or impeding of navigation."[2]

The Supreme Court of Louisiana, thereupon, on December 9, 1949, itself rendered judgment in favor of the State and against appellant for the amount of taxes claimed, with penalties, interest and attorneys' fees.

The opinion and judgment are accordingly a decision in favor of the validity of Act 25 of the Second Extra Session of 1935 as amended, as against the contention of its repugnance to section 8 of article 1 and section 2 of article 3 of, and the fourteenth amendment to, the Constitution of the United States.

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[1] See opinion of Civil District Court for the Parish of Orleans, Louisiana, set out in full in Appendix A to this Statement as to Jurisdiction, *post*.

[2] See opinion of Supreme Court of Louisiana set out in full in Appendix B to this Statement as to Jurisdiction, *post*.

This proceeding accordingly squarely presents a final judgment rendered by the highest court of the State of Louisiana in which there is drawn in question the validity of a Louisiana statute on the ground of its being repugnant to the Constitution of the United States, the decision in which was in favor of its validity, and which is accordingly reviewable by the Supreme Court of the United States on appeal under section 1257 of title 28 of the United States Code.

E

Grounds Upon Which It Is Contended that the Questions Involved Are Substantial

The case presents squarely the question of constitutionality of a state tax statute as an invasion of the admiralty jurisdiction of the United States, a burden on interstate commerce, and a denial of due process of law.

The state statute under consideration, as here sought to be applied, attempts to place conditions on the exercise, by a vessel, of her federal license to engage in the coasting trade—a deep-seated conflict between state and federal powers.

The Supreme Court of the United States has heretofore had occasion to strike down state license tax statutes when applied to federally licensed vessels, both as an invasion of the admiralty jurisdiction of the United States,[3] and as imposing an undue burden on interstate commerce.[4] It has also held such statutes invalid as denials of due process of law when applied in such a way as to invite confiscatory taxation.[5]

---

[3] *Sinnot* v. *Davenport*, 22 How. 227 (1859); *Harmon* v. *Chicago*, 147 U. S. 396 (1893); *Moran* v. *New Orleans*, 112 U. S. 69 (1884).

[4] *Hall* v. *DeCuir*, 95 U. S. 485 (1878). See *Western Live Stock Co.* v. *Bureau of Revenue*, 303 U. S. 250 (1938).

[5] *Fort Smith Lumber Co.* v. *State of Arkansas*, 251 U. S. 532 (1920).

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The Supreme Court of Louisiana nevertheless sustained the statute here in question, so applied, as a legitimate exercise of state power, finding nothing in the statute in conflict with the paramount rights of the federal government.

It is submitted that the questions presented are not only substantial, but highly important for definitive adjudication by the Supreme Court of the United States.

F

Stage of Proceedings and Manner in Which Federal Questions Were Raised

As already indicated, the unconstitutionality of the Louisiana statute under attack was raised specifically and expressly by responsive pleading in the court of instance. It was discussed fully in brief and oral argument in both the court of instance and the Supreme Court of Louisiana.

G

Manner in Which Questions Involved Were Passed Upon By Court

The court of instance, in a written opinion, specifically upheld the contention of unconstitutionality of the state statute as applied.[6] The Supreme Court of Louisiana, also by written opinion, stated the federal grounds on which the validity of the statute was being attacked, and expressly decided in favor of the validity of the statute as against the cited contentions of repugnancy to the Constitution of the United States.[7]

---

[6] See opinion of Civil District Court for the Parish of Orleans, Louisiana, set out in full in Appendix A to this Statement as to Jurisdiction, *post*.

[7] See opinion of the Supreme Court of Louisiana, set out in full in Appendix B to this Statement as to Jurisdiction, *post*.

H

Cases Believed to Sustain Jurisdiction

The following cases sustain the jurisdiction of the Supreme Court of the United States:

1. Jurisdiction to entertain appeal from a holding of a state court that a state statute does not invade the admiralty jurisdiction of the United States:

Standard Dredging Company *v.* Murphy, 319 U. S. 306 (1943).

Clyde Mallory Lines *v.* State of Alabama, 296 U. S. 261 (1936).

2. Jurisdiction to entertain appeal from a holding of a state court that a state statute does not burden interstate commerce:

Aero Mayflower Transit Co. *v.* Board of Railroad Commissioners, 332 U. S. 495 (1947);

International Harvester Co. *v.* Evatt, 329 U. S. 416 (1947).

3. Jurisdiction to entertain appeal from a holding of a state court that a state statute does not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States:

Wheeler Steel Corp. *v.* Glander, 337 U. S. 562 (1949);

Treichler *v.* State, 70 S. Ct. 1 (1949).

Wherefore the appellant, Standard Dredging Corporation, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of section 1257 of title 28 of the United States Code.

Respectfully submitted,

(Sgd.) EBERHARD P. DEUTSCH,
of
DEUTSCH, KERRIGAN & STILES,
Counsel for Standard Dredging Corporation, Petitioner and Appellant.

New Orleans, January 9, 1950.

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APPENDIX A

IN THE CIVIL DISTRICT COURT IN AND FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA

Division "A"

Docket

No. 238,041

State of Louisiana, ex rel Rufus W. Fontenot, Director of Revenue

versus

Standard Dredging Corporation

Reasons for Judgment

A careful review of the pleadings, the facts as shown by stipulation and exhibits, the clear oral argument and the careful briefs of counsel for both parties, satisfies the court that the power produced by defendant cannot validly be subjected to the tax imposed by Louisiana Act 25 of the Second Extra Session of 1935, as amended, commonly known as the Louisiana Power Tax Act, under attack in this litigation.

The power produced by defendant is generated in the engine rooms of its dredges which are duly enrolled as vessels, and are licensed as such, to engage in the coasting trade, by the Bureau of Marine Inspection and Navigation of the Department of Commerce of the United States. The generation of this power is necessary for, and is an inherent and component part of the exercise of the federal license.

During the years for which the power taxes are sought to be imposed, defendant's vessels at times moved over the high seas, and operated on the navigable waters of foreign countries, and of the United States in various states, including at times Louisiana.

Under the authorities cited in the argument and brief of counsel for defendant, neither the operation of these vessels so licensed by the United States, nor the perform-

ance of any function or the doing of any act which is an integral part of such operation of the vessels under their federal licenses, may be subjected to any state license, exercise or privilege taxation, or any other similar local burden.

Since it is the opinion of the court that, for the reasons briefly stated above, the legislation in question may not validly be applied to the power generated by defendants in their vessels, it is unnecessary to pass on other points of defense asserted against the impact of the statute.

Judgment accordingly may be entered in favor of defendant dismissing the suit.

(Sgd.) PAUL CHASEZ,
Judge.

New Orleans, Louisiana, July 9, 1947.

APPENDIX B

SUPREME COURT OF LOUISIANA

No. 38,784

STATE OF LOUISIANA, ex rel. RUFUS W. FONTENOT, Collector of Revenue (Succeeded by Roland Cocreham, Collector of Revenue)

v.

STANDARD DREDGING CORPORATION

Appeal from Division "A" of the Civil District Court, Parish of Orleans: Hon. Paul E. Chasez, Judge

FOURNET, Chief Justice.

The State of Louisiana is appealing from a judgment dismissing its suit against the Standard Dredging Corporation wherein it seeks to recover taxes accrued through 1945 in the total sum of $11,701.35, with interest and penalties, claimed as being due the State of Louisiana under the provisions of Act 25 of the Second Extra Session of 1935, as amended, commonly known as the power tax statute.

This suit, when originally instituted in December, 1940, was to recover taxes alleged to be due the State at that time

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in the amounts of $150, additional taxes for the year 1939, and $1,012.50, taxes for the fiscal year ending July 31, 1940, with interest, penalty and attorney's fees. Defendant filed certain exceptions, and because of repeated continuances the trial on the merits was delayed. In December, 1945, in order to avoid a multiplicity of suits, a supplemental petition was filed claiming taxes which had accrued through 1945.

The defendant, a New York corporation with its principal office and place of business in New York City but qualified to do business in Louisiana, is a contractor engaged in deepening, widening, improving, extending and clearing navigable waterways, and for many years has been pursuing this business in the State of Louisiana under license as contractor issued pursuant to the provisions of Section 24 of Act 15 of the Third Extra Session of the Louisiana Legislature for the year 1935, commonly known as the general occupational license tax statute. In the conduct of its business defendant uses dredges which are licensed by the Bureau of Marine Inspection and Navigation of the Department of Commerce of the United States to engage in the coasting trade. These dredges are operated by mechanical power produced by their machinery, and the tax here sought to be imposed is based on the power generated by the engines of defendant's dredges in the conduct of its business while the dredges were on waters within the territorial limits of the State of Louisiana, under the authority to Sec. 3, Act 25 of the Second Extra Session of 1935, as amended, the pertinent part of which provides:

> "*In addition to all other taxes of every kind imposed by law,* every person, firm, corporation or association of persons engaged in the State of Louisiana in any business or occupation which person, firm, corporation or association of persons uses in the conduct of such business or occupation at any time, electrical or mechanical power of more than ten horsepower and does not procure all of the power required in the conduct of such business or occupation from a person, firm, corporation, or association of persons subject to the tax imposed by section 1 or section 2 of this act, shall be

> subject to the payment of an excise, license or privilege tax of fifty cents (50¢) per annum for each horsepower of capacity of the machinery or apparatus, known as the 'prime mover' or 'prime movers,' operated by such person, firm, corporation or association of persons, for the purpose of producing power for use in the conduct of such business or occupation; . . ." (emphasis supplied)

It is the contention of the defendant, in which it was sustained by the lower court, that the imposition of this license tax constitutes double taxation. Defendant argues that it has paid to the State an occupational license tax on the basis of gross receipts of its business as contractor for the years during which the power tax is claimed, and the generation of the mechanical power is a necessary part of its business as contractor; and that therefore the power tax as applied to it, already licensed as a contractor, is void under Article X, Section 8 of the Louisiana Constitution, and under the Fourteenth Amendment to the Federal Constitution, as dual taxation. Further, defendant contends that the tax, as applied to defendant's vessels, invades the admiralty and commerce jurisdictions of the United States, in a field in which Congress, by providing for the enrolling and licensing of such vessels, has exercised exclusive control, and deprived the states of any authority further to license or tax the operation of such vessels, or the means of their operation, in the exercise of their federal licenses.

The jurisprudence of Louisiana with reference to power tax statutes implies an adverse answer to defendant's first contention. See State *v.* R. L. Hunt, 182 La. 1073, 162 So. 777; State *v.* Interstate Natural Gas Co., Inc., 200 La. 52, 7 So. (2d) 612; State *v.* Triangle Drilling Co., Inc., 214 La. 273, 37 So. (2d) 598.

Article X, Section 8 of the Louisiana Constitution provides that license *taxes* may be levied on such classes of persons, associations of persons and corporations pursuing any business or occupation as the Legislature may deem proper (with certain exceptions), and provides that such license taxes may be classified, graduated or progressive;

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however, there is no limitation as to the number or kind of license taxes which may be imposed under this provision of the Constitution and one person may avail himself of one or more different privileges, for each of which he may be required to pay a tax or license fee. The requirement frequently made essential to the existence of double taxation in the unconstitutional sense, namely, that both impositions must be against the *same taxable subject*, is here lacking, for in the case of the occupational license, the tax is imposed for the privilege of engaging in the business of contractor in the State, whereas in the case of the power tax, the levy is based on the use of electrical or mechanical power in the conduct of a business, measured by the horsepower of capacity of the machinery used in the production of the power. It follows that although the defendant has paid the occupational license tax, there is no infringement of his constitutional rights because of liability for a specific license tax upon the use of a particular agency necessary to be employed in the conduct of his business. See 21 Am. & Eng. Enc. Law, p. 787; St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045; Harder's Fireproof Storage & Van Co. *v.* Chicago, 235 Ill. 58, 85 N. E. 245; Macon Sash, Door & Lumber Co. *v.* Macon, 96 Ga. 23, 23 S. E. 120; Browne *v.* Mobile, 122 Ala. 159, 25 So. 223.

The authorities relied on by the defendant in support of its argument that this tax constitutes double taxation, namely, Williams *v.* Garignes, 30 La. Ann. 1094, Walker *v.* City of New Orleans, 31 La. Ann. 828, and State *v.* City Savings Bank & Trust Co., 170 La. 426, 127 So. 890, are not controlling here. As was very aptly pointed out by this court in the case of Lionel's Cigar Store . McFarland, 162 La. 956, 969, 111 So. 341, wherein the holdings in the first two cases were reviewed: "In Williams *v.* Garignes, Tax Collector, the court merely construed the statute requiring a license tax 'from each keeper of a livery stable, with stalls for horses or mules, twenty-five dollars; for every public hack twenty-five dollars,' as meaning that either a livery stable keeper or a public hack driver was liable for the $25 license tax, but that neither was liable for two such license taxes. In Walker *v.* City of New Orleans, the ruling was that an ordinance was invalid which required the owners or

drivers of vehicles kept for hire to attach to each vehicle a pair of license plates furnished by the city and to pay an exhorbitant tax as the price of each pair of plates. The city attorney, admitting that the ordinance was not valid as an exercise of the taxing power for raising revenue, contended that the tax was valid as a police regulation. The only question therefore was whether the imposition of the tax was a legitimate exercise of the police power; and the court held that it was not."

In the third case relied on by the defendant, State *v.* City Savings Bank & Trust Co., the tax collector claimed the license tax on the business of leasing surplus space in the bank's building, under the omnibus clause of an act of the Legislature which did not expressly levy a license tax on the business of operating an office building. The only question therefore was whether such business was embraced in the omnibus clause, levying the tax on "any other business not provided for in this Act," and the court held that the Legislature did not so intend.

We pass now to a consideration of defendant's second contention. Relying on the cases of Sinnot *v.* Davenport, 22 How. 227, 16 L. Ed. 243, Harmon *v.* City of Chicago, 147 U. S. 396, 13 S. Ct. 306, 37 L. Ed. 216, Moran *v.* City of New Orleans, 112 U. S. 69, 5 S. Ct. 38, 28 L. Ed. 653, and Hall *v.* DeCuir, 95 U. S. 485, 24 L. Ed. 547, defendant urges that, as applied to its vessels, the tax sought to be here imposed invades the admiralty and commerce jurisdictions of the United States. A study and analysis of these cases shows that they are authority only for the proposition that laws enacted by states and their subdivisions which in effect regulate commerce or interfere with navigation are, to that extent, unconstitutional and void. In Sinnot *v.* Davenport, an Act of Alabama provided that before a boat could leave the port, certain formalities of registration had to be complied with, under penalty of a fine, to be recovered by suit against the owners or attachment against the boat. Harmon *v.* Davenport concerned a city ordinance which sought to regulate navigation on the Chicago River, and required the owners of vessels to obtain licenses under penalty of a fine. In Moran *v.* City of New Orleans, a city ordinance established the rate of license to be collected from

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those running tow-boats to and from the Gulf of Mexico, under penalty of injunction until the license was paid. And Hall *v.* DeCuir simply held that an act of the Legislature which set up rules and regulations for public carriers of passengers, including steamboats, was not applicable to a passenger-carrying steamship plying between New Orleans, Louisiana, and Vicksburg, Mississippi, since the application of such regulations as to it would constitute a direct interference with the freedom of interstate commerce.

The right to regulate commerce and control navigation is in the Congress of the United States, the various states, in adopting the Constitution, having surrendered to the Federal Government all authority in such matters; and the states and their political subdivisions are therefore without authority to enact laws which will interfere with commerce or which will impede or place a burden on navigation. However, the tax here imposed, as previously stated, is solely on the use of electrical or mechanical power produced by the defendant corporation and used in its business while within the territorial limits of the State of Louisiana, and is on only that part of the power which is used in connection with the particular business of dredging, and not on that part which may be used in the navigation of the vessels—though produced by the same machinery. It is clear, therefore, that the imposition of the power tax in no way affects the permission granted under the Federal license to navigate waters of the United States for the purpose of carrying on the coasting trade, and imposes no additional condition to the privilege of carrying on such trade; nor does it result in the regulation or impeding of navigation.

For the reasons assigned, the judgment of the lower court is annulled and set aside, and it is now ordered that there be judgment in favor of the State of Louisiana and against the Standard Dredging Corporation in the sum of $8,343.00, representing the total tax due, plus $2,048.25 as penalty, together with six (6%) per cent per annum interest on the tax due for each of the tax years involved, i.e., on $150.00 from September 1, 1939, until paid; on $1,012.50 from September 1, 1940, until paid; on $1,064.50 from September 1, 1942 until paid; on $3,782.00 from September 1, 1943, until paid; and on $2,334.00 from September 1, 1944, until paid;

plus an additional amount of ten (10%) per cent on the total amount of taxes, penalties, and interest, for attorneys' fees and costs; and that the lien and privilege of the State of Louisiana on all property of the defendant Standard Dredging Corporation within the State be recognized and enforced for the payment of the above tax, penalty, interest, attorneys' fee and costs.

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